UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 13-1292-DOC (JCGx) Date: August 27, 2014

Title: JACOB PETERSEN V. TOWNSEND FARMS INC. ET AL.

PRESENT: THE HONORABLE DAVID O. CARTER, JUDGE

Julie Barrera	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO DISMISS AND DENYING (AS MOOT) MOTION TO STRIKE AND MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Before the Court are:

- Defendant Purely Pomegranate Inc.'s Motion To Strike Class Allegations And Request For Attorneys' Fees From Second Amended Complaint ("Motion to Strike") (Dkt. 48);
- Defendant Purely Pomegranate Inc.'s Motion To Dismiss Second Amended Complaint For Lack Of Standing And For Failure To State A Claim ("Motion to Dismiss") (Dkt. 49); and
- Plaintiff's Motion For Leave To File Third Amended Complaint ("Motion for Leave") (Dkt. 50).

The Court finds these matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15.

Having considered the moving and opposing papers submitted in connection with the three motions, the Court GRANTS Purely Pomegranate Inc.'s Motion to Dismiss and dismisses the Second Amended Complaint with leave to amend and DENIES both Purely Pomegranate Inc.'s Motion to Strike and Plaintiff's Motion for Leave as MOOT.

I. Background

Plaintiff Jacob Petersen ("Peterson") brings this action on behalf of himself and a putative class against four corporate defendants. The Second Amended Complaint ("SAC") (Dkt. 19) alleges that "Plaintiffs" and others were "injured as a result of actual or potential exposure to the hepatitis A virus" ("HAV"). SAC ¶ 10. HAV "causes severe gastrointestinal illness and, in severe cases, liver failure and death." *Id.* ¶ 29.

Petersen alleges that a product called "Townsend Farms Organic Anti-Oxidant Blend" (the "Product") was sold in Costco stores in at least eight states. *Id.* ¶ 10. Defendant Townsend Farms, Inc. ("Townsend Farms") recalled the Product because it "has the potential to be contaminated with [HAV], based on an ongoing epidemiological and traceback investigation by the FDA and the CDC of an illness outbreak." *Id.* "Plaintiffs" and others were actually or potentially exposed to HAV by either consuming the Product or being "expos[ed] to, or [in] close proximity with, the Product or persons who were exposed to the Product." *Id.*

HAV "incubates in the human body for between 15 and 50 days." *Id.* ¶ 29. Therefore, public health officials continue to monitor for additional HAV infections and illnesses associated with the Product. *Id.* "The CDC and other state and regional public health agencies have advised any purchasers of the Defendants' Product to refrain from consuming the Product, and to obtain HAV vaccination, or a prophylactic dose of [immune globulin ("IG")]. Public health officials have also recommended that people exposed to an individual known to have become ill in the Defendants' HAV outbreak, or who were exposed to the Product, to also obtain HAV vaccination, or a prophylactic dose of IG." *Id.* ¶ 30.

"Plaintiffs purchased and/or consumed the Product before the Product's association with the HAV outbreak was known . . . ." *Id.* ¶ 32. "Plaintiffs thereafter received vaccinations against HAV or a prophylactic dose of IG, and/or underwent serology or other diagnostic testing procedures to determine whether such exposure had resulted in infection by HAV." *Id.*

Petersen alleges that Defendant Purely Pomegranate, Inc. ("PPI") "carried on . . . the import, manufacture, distribution, and sale of pomegranate seeds to Townsend Farms for inclusion in the [Product] that has been determined to be the cause of an outbreak of at least 162 HAV illnesses in ten states." *Id.* ¶ 3. Petersen asserts claims for strict liability and negligence against Townsend Farms, PPI, Fallon Trading Co., Inc., and United Juice Corp. *Id.* ¶¶ 33-49. He also asserts a claim for breach of warranty against Townsend Farms only. *Id.* ¶¶ 50-55.

On June 25, 2014, PPI filed the Motion to Dismiss the case based on lack of standing and failure to state a claim. (Dkt. 49.) PPI also filed the Motion to Strike all class allegations and Petersen's requests for attorney's fees from the SAC. (Dkt. 48.) Shortly thereafter, Petersen filed his Motion for Leave. (Dkt. 50.)

II. Legal Standard

A. Standing

The burden to prove standing is on "the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *United States v. Hays*, 515 U.S. 737, 743 (1995) (internal quotations omitted). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) [he or she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Those who do not have Article III standing may not litigate in federal court. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982). In order to seek relief on behalf of himself and a putative class, a named plaintiff must have standing independent of potential class members. *O'Shea v. Littleton*, 414 U.S. 488, 494-95 (1974).

B. Stating a Claim for Relief

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, the court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

Dismissal without leave to amend is appropriate only when the court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment.

Jackson v. Carey, 353 F.3d 750, 758 (9th Cir. 2003); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made). Rule 15(a)(2) of the Federal Rules of Civil Procedure states that leave to amend should be freely given "when justice so requires." This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

III. Discussion

A. Motion to Dismiss

1. *Standing*

PPI argues that the injuries alleged in the SAC are too speculative and too attenuated from any action or inaction by PPI to give rise to standing. PPI also argues that Petersen fails to allege facts establishing that he, separate from putative class members, has standing. As detailed below, the Court disagrees that the alleged injuries cannot support standing but agrees that Petersen has not clearly alleged his own standing.

a. *Petersen Sufficiently Alleges Injury for Standing Purposes.*

In its argument that Petersen failed to allege sufficient injury, PPI relies on *Clapper v. Amnesty Int'l*, 568 U.S. __, 133 S. Ct. 1138 (2013). *Clapper* involved a facial challenge to a provision of the Foreign Intelligence Surveillance Act ("FISA"). The question before the Supreme Court was whether the plaintiffs had standing to seek *prospective injunctive relief*. *Id.* at 1142. The plaintiffs were attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive e-mail and telephone communications with individuals located abroad. *Id.* at 1145. The challenged provision (50 U.S.C. § 1881a) was enacted in 2008 and broadened the scope of the government's power of electronic surveillance of communications for foreign intelligence purposes. *Id.* at 1144. Surveillance under the new provision, however, remains subject to basic protections, such as judicial authorization and compliance with the Fourth Amendment. *Id.*

The Court rejected the plaintiffs' argument of a reasonable likelihood of future injury. *Id.* at 1149-50. The plaintiffs alternatively argued that they had ongoing injuries because the threat of surveillance under FISA required them to take costly and burdensome measures to protect the confidentiality of their communications. *Id.* at 1150. For example, they claimed that the threat of surveillance sometimes compels them to

avoid certain e-mail and phone conversations, to talk in generalities, or to travel so they can avoid electronic communications. *Id.* at 1151. The Court rejected the argument, finding that the measures taken by the plaintiffs were self-inflicted and "based on their fears of hypothetical future harm that is not certainly impending." *Id.* As a result, the Court held that the claimed ongoing injuries were not fairly traceable to the FISA amendments. *Id.*

Clapper does not stand for the proposition that undertaking expenditures and prophylactic measures can never be sufficient to establish injury in fact. The facts alleged in the SAC are distinguishable from *Clapper*. Here, Townsend Farms allegedly characterized the reason for the recall of its own product as follows: "[The Product] has the potential to be contaminated with Hepatitis A virus, based on an ongoing epidemiological and traceback investigation by the FDA and the CDC of an illness outbreak." SAC ¶ 10. Additionally, "[t]he CDC and other state and regional public health agencies have advised any purchasers of the Defendants' Product to refrain from consuming the Product, and to obtain HAV vaccination, or a prophylactic dose of IG . . . ." *Id.* ¶ 30. In this regard, PPI mischaracterizes the alleged injuries as "aris[ing] from the subjective fear of an individual." Motion to Dismiss at 6. Unlike in *Clapper*, the statements of Townsend Farms and the CDC (and other agencies) establish both that the harm alleged is not self-inflicted and that the injury is fairly traceable to the Product. Moreover, Petersen sufficiently pleaded PPI's involvement such that the injury can be fairly traced to PPI: "[PPI] carried on . . . the import, manufacture, distribution, and sale of pomegranate seeds to Townsend Farms for inclusion in the [Product]." *Id.* ¶ 3.

The SAC alleges that those who consumed the Product or were otherwise exposed to the Product or to another person who was exposed to the Product obtained vaccinations against HAV, received a prophylactic dose of IG, and/or underwent serology or other diagnostic testing procedures to diagnose an infection by HAV. *Id.* ¶¶ 10-11. Such action was taken at the direction of public health agencies that had linked the Product to an HAV outbreak. *Id.* ¶¶ 10, 30. This injury is sufficiently concrete and actual, fairly traceable to PPI, and likely to be redressed by a favorable decision. *See Friends of the Earth*, 528 U.S. at 180-81.

b. *Petersen Fails to Sufficiently Allege that He was Personally Injured.*

PPI also argues that Petersen fails to allege facts showing he personally was injured. Motion to Dismiss at 5. The only specific fact clearly alleged in the SAC about Petersen is that he "resides at 1229 Spectrum, Irvine, Orange County, California." SAC ¶ 1. All other allegations are in reference to "Plaintiffs." Because Petersen is the only

named plaintiff, it is unclear as to whether allegations about "Plaintiffs" refer to the prospective class, Petersen, or both. This is significant because, in order survive a motion to dismiss, a class action complaint must contain allegations establishing that a named plaintiff actually has standing to bring the claims asserted. *O'Shea*, 414 U.S. at 494-95.

For this reason, PPI's motion is GRANTED and the SAC is DISMISSED. To be clear, although the Motion to Dismiss was brought only by PPI, the SAC is dismissed in its entirety because the failure to plead facts establishing standing is a question of justiciability, not of the sufficiency of claims asserted against a particular party. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-41 (2006) (federal courts "have no business deciding" a dispute that is not a proper case or controversy).

2. *Petersen's Theory of Negligence Per Se Fails*

As part of his negligence claim, Peterson alleges that the defendants violated unspecified federal, state, and local food safety regulations and that such violation "constitutes negligence per se." SAC ¶¶ 46-47. Under California law, defendant is presumed to have a legal duty toward plaintiff and to have breached that duty if the plaintiff can show that: "(1) the defendant violated a statute or regulation, (2) the violation caused the plaintiff's injury, (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent, and (4) the plaintiff was a member of the class of persons the statute or regulation was intended to protect." *Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180, 1184-85 (1999); *see also* Cal. Evid. Code § 669.

As pointed out by PPI, the SAC fails to identify which specific statute and/or regulation PPI violated. Rather, the SAC only generally references the "federal Food, Drug and Cosmetic Act" and "federal, state and local food safety regulations." *See* SAC ¶¶ 45-49. These allegations do not provide enough information "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Peterson "cannot make [PPI] and the court guess at which law was violated." *Evraets v. Intermedics Intraocular, Inc.*, 29 Cal. App. 4th 779, 794 (1994) (finding plaintiff's pleading in adequate because of failure to specify which of "innumerable regulatory requirements" defendants failed to satisfy); *see also Estate of Bock v. Cnty. of Sutter*, 2:11-CV-00536-MCE, 2012 WL 423704, at *12 (E.D. Cal. Feb. 8, 2012) (citing *Twombly*).

Thus, Petersen has not sufficiently pleaded application of the evidentiary doctrine of negligence per se.

3. *Granting Leave to Amend Is Appropriate*

PPI contends that leave to amend should not be granted on the grounds that Petersen failed to allege injuries that he specifically suffered and that Petersen failed to adequately allege that any such injuries were causally linked to PPI. As described above, this Court finds that Petersen adequately alleged injuries that could be traced to PPI. If Petersen can allege facts showing he, in particular, suffered the injury asserted in the SAC, he will have properly pleaded that he has standing to pursue the claims.

It appears that Petersen's deficiency in pleading his actual injury is curable by amendment and PPI has failed to otherwise provide an adequate basis for denying leave to amend. *See Jackson*, 353 F.3d at 758 (leave to amend should be granted where deficiencies in complaint can possibly be cured by amendment). Thus, the SAC is dismissed WITHOUT PREJUDICE.

B. **Motion to Strike and Motion for Leave**

Because the SAC is DISMISSED with leave to amend, the Motion to Strike and Motion for Leave are both denied as MOOT.

IV. **Disposition**

For the reasons discussed above, the Court DISMISSES the SAC WITHOUT PREJUDICE. Petersen shall file an amended complaint, if at all, on or before **September 15, 2014**.

The Clerk shall serve this minute order on the parties.